United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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George Smith, Jr., Appellant, v. United State of America, Appellee.	No. 22157
Johnny B. Rozier, Jr., Appellant, v. United States of America Appellee.	No. 22158

On Appeal From Judgments of the United States District Court

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BRIEF OF THE APPELLANTS

Statement of the Issues Presented for Review

1. Whether the trial court could properly impose consecutive sentences for convictions of assault with intent to kill and assault with a dangerous weapon based upon the same transaction.

2. Whether, in a trial upon an indictment for assault with intent to kill, the trial court should have directed an acquittal for lack of proof of intent to kill

where there was no direct proof of such intent, and no weapon likely to cause death was involved, no injuries likely to produce death were sustained, and other means more likely to cause death were readily available and ignored.

3. Whether, in a trial upon an indictment for assault with intent to kill, and assault with a dangerous weapon, the trial court should have directed an acquittal where the only evidence in support of key elements of these offenses was testimony which was demonstrably perjured on two critical issues and which was riddled with inconsistencies and conflicts in numerous other respects.

4. Whether the trial court should have granted appellant Smith's motion for acquittal for lack of a speedy trial, where thirteen months elapsed from the offense to trial, the accused was in jail for lack of bail throughout that period, there was no contribution to, or acquiescence in, delay by the accused, and, in the intervening time, a key witness had disappeared.

Pursuant to Rule 8(d) the Court is advised that the pending case has not previously been before this Court.

Statement of the Case

Appellants were indicted, tried and convicted on each of two counts: Count 1, assault with intent to

kill in violation of 22 D. C. Code § 501; and Count 2, assault with a dangerous weapon in violation of 22 D. C. Code § 502. The trial of the two appellants was consolidated, over the objection of court-appointed counsel for appellant Smith. On June 14, 1968, the trial court imposed upon each of the appellants a sentence of 5 to 15 years on Count 1, and 40 months to 10 years on Count 2; "said sentences, by the counts, to run consecutively." (underlining supplied)

Each appellant applied for leave to appeal without prepayment of costs, which was granted. The Court of Appeals on July 25, 1968, consolidated the appeals and appointed the undersigned as counsel for both appellants.

The events which were the subject of the indictment occurred on Sunday, February 12, 1967. In the afternoon of that day, following a weekend of drinking, appellant Rozier and one Julia Perkins, who had been living with Rozier as his common-law wife for approximately six months, engaged in an argument following her statement that she was pregnant by him. There were present in the two-room apartment at that time, in addition to Rozier and Perkins, the appellant Smith who lived in the apartment with Rozier and Perkins, one Elsie Brown who lived in another room on the same floor, and one James R. Harding, a white, crippled, chronic alcoholic, who visited the apartment for the first time that day for the purpose of joining in the drinking.

In the course of this argument Rozier struck Perkins. Subsequently, when the police arrived Mrs. Perkins was sitting on a landing at the foot of the stairs going down from the third floor apartment. She was either unconscious or nearly so, almost devoid of clothing, and in a pool of blood. The precise events in the period from Rozier's striking Perkins in the course of their argument until the police arrived are not clear.

Mrs. Perkins, herself, testified merely (Tr. 20-21):

> Q. .... Now, after you had this quarrel with Mr. Rozier, what, if anything, did you do next?
>
> A. Well, I don't remember doing anything. All I know, he just jumped -- assaulted me, grabbed me around my neck.
>
> * * *
>
> Q. Now, you said he jumped on you. Just tell us exactly what he did to you that you can remember.
>
> A. Well, all I remember, me and him had this quarrel, wasn't anything, just came over to me, and I guess he shook me so until I lost consciousness.
>
> Q. Do you remember him choking you?
>
> A. Yes, I remember him choking me.
>
> Q. Do you remember him doing anything else to you?
>
> A. I blacked out.

She said she did not regain consciousness until she was at the Washington Hospital Center. (Tr. 21) Accordingly, she knows nothing of the events after Rozier struck her or grabbed

her around the neck.

With respect to the appellant Smith, Mrs. Perkins testified specifically to the fact that he was "in the bed", or "laying across the bed in the other room of the apartment at the time. (Tr. 19, 22)

Appellant Rozier's testimony is substantially in accord with Perkins' testimony. He explained her location at the foot of the stairs as due to the fact that she left to go to the bathroom on the second floor and fell down the stairs. (Tr. 172, 179) He attributed her bleeding to her falling upon glass which had fallen and broken on the kitchen floor in the course of the argument. (Tr. 171-173, 177-180) He confirmed that Smith was in the other room. (Tr. 177, 182-183)

Appellant Smith's testimony was likewise consistent with that of Mrs. Perkins. He was asleep in the other room and was not aware of anything until the commotion when Mrs. Perkins landed at the bottom of the stairs. (Tr. 192-193)

The only basis for conviction of either appellant is the testimony of James R. Harding. As will be developed below, Harding's testimony was so completely riddled with perjury, conflicts and inconsistencies as to be beyond belief. With respect to the events after the initial blows to Mrs. Perkins, Harding's testimony is as follows. Smith was on the bed in the kitchen (not in the other room). (Tr. 100-H-I) Smith got up and Smith and Rozier together tore Mrs. Perkins'

clothing completely off. (Tr. 100-J) Rozier then took a curling iron and "run it up Mrs. Perkins' vagina". (Tr. 100-K) Smith "was holding her down, and he took a hammer that was lying on the stove behind, while he was holding her down... and hit the end of it and hit it into the vagina, and she was bleeding pretty bad." (Tr. 100-K) Smith struck the curling iron twice. (Tr. 100-L) Rozier and Smith then threw Perkins down the stairs. (Tr. 100-M) For reasons which will be developed in detail below, the jury should never have been permitted to consider Harding's bizarre tale.

Elsie Brown was the one other person who was present at or near the time of the alleged assault. So said Perkins (Tr. 28, 31, 38-39); Officer O'Toole (Tr. 130-131); Officer Short (Tr. 161); Harding (Tr. 79, 100-G, 100-L-M, 100-O, 100-FF, 120); Rozier (Tr. 172), and Smith (Tr. 199, 202, 211-213). When this case finally came to trial thirteen months later, on March 13, 1968, Elsie Brown had disappeared. (Tr. 130-131)

Summary of Argument

1. The trial court erred in imposing consecutive, rather than concurrent, sentences for offenses growing out of essentially one transaction. Consecutive sentences for the two specific offenses involved in this case have been expressly proscribed by this Court in Ingram v. U. S., 122 App. D.C. 354, 353 F.2d 872 (1965). Ingram governs the case at bar.

2. There was no evidence whatsoever of an intent to kill and the trial court erred in refusing to grant acquittal on the first count (assault with intent to kill). Even if Harding's story of the forceful insertion of a curling iron into the vagina is true, it nevertheless does not evidence an intent to kill. While this particular form of attack may threaten bodily injury, it is certainly not well calculated to cause death; death is not the probable consequence of such an attack. In any event, Harding, himself, testified (during extensive questioning by the court when the jury was out) to the specific intent accompanying the use of this unusual weapon. He said that Smith said 'We'll perform an abortion." (Tr. 74) This is entirely different from an intent to kill.

3. Appellants' convictions depend upon the testimony of a single witness - Harding. Harding's testimony is so riddled with perjury, conflicts and inconsistencies as to be beyond belief. This testimony should have been excluded from the jury's consideration and appellants' motions for acquittal should have been granted for lack of any other evidence.

4. Appellant Smith's motion for acquittal due to lack of a speedy trial should have been granted. His situation clearly meets the standards established by this Court as warranting such acquittal: length of time, over 13 months;

in jail throughhout this period; no contribution to, or acquiescence in, delay by the accused; prejudice, through the disappearance of a witness.

Argument

I. The Trial Court Erred in Imposing Consecutive, Rather Than Concurrent, Sentences for Offenses Growing Out of Essentially One Transaction.

(With respect to Point I, appellants desire the Court to read the following pages of the Reporter's Transcript: the sentence hearing on June 14, 1968.)

The trial court imposed not only the maximum allowable sentence for each count, but provided that such sentences shall run consecutively, rather than concurrently. The net effect is that each appellant is subject to a minimum sentence of 8 years and 4 months and a maximum sentence of 25 years in spite of the fact that the Congress of the United States has set as the most severe sentence for any assault, however serious, a minimum term of 5 years and a maximum of 15 years.

Such judicial extension and distortion of Congressional intent has been previously criticized and repudiated by this Court. Ingram v. U. S., 122 App. D.C. 354, 353 F.2d 872 (1965). Significantly, the Ingram case involved the same two offenses as are involved in the case at bar: assault with intent to kill and assault with a dangerous

weapon. The analysis of precedents in the Ingram opinion is complete and repetition here would be superfluous. Ingram recognizes that separate offenses may arise out of or inhere in the same transaction but whether separate, consecutive sentences can be imposed therefor depends upon an examination of the intent of the legislature in defining the offenses. With particular reference to the two offenses here involved, Ingram holds:

> Looking beyond the stereotyped formula, however, we cannot say with any certainty that Congress intended that one assault with a knife in an attempt to kill would be twice punished because it was an assault with a knife. To say such an act constitutes both an assault with a deadly weapon and an assault with intent to kill does not say that the punishment may be twofold where the offenses are commingled in one assault, unless it can be said also that two punishments were intended by Congress....
>
> There are certain objective manifestations of Congressional intent which support our position. The District of Columbia Code sets out in four provisions the definitions and punishments for four kinds of assault with descending degrees of severity: D.C. Code § 22-501, Assault with intent to kill, rob, rape, or poison (15 years maximum); D. C. Code § 22-502, Assault with intent to commit mayhem or with dangerous weapon (10 years); D.C. Code § 22-503, Assault with intent to commit any other offense (5 years); D.C. Code § 22-504, Simple Assault (1 year). This structure suggests that the offenses of assault with intent to kill and assault with a dangerous weapon are regarded as offenses on the same spectrum, the former being worse than the latter. The statute suggests a gradient of aggravated assaults. Although the various sections may define

> "separate and distinct offenses," it is unlikely that Congress intended a single act to be punished cumulatively as both a more and a less serious form of aggravated assault.

This holding governs the case at bar.

II. There Was No Evidence of An Intent to Kill. The Trial Court Erred in Denying Appellants' Motions for Acquittal On the First Count. 1/

(With respect to Point II, appellants desire the Court to read the following pages of the Reporter's Transcript: 19-22, 69-82, 100 E-N, 150-54.)

A. The evidence.

There was simply no evidence of an intent to kill. Even if Harding's story of the forceful insertion of a curling iron into the vagina is true, it nevertheless does not evidence an intent to kill. While this particular form of attack may cause bodily injury, it certainly is not one well calculated to cause death; death is not the probable consequence of such an attack. Substantially the same thing may be said with respect to Harding's testimony that Rozier and Smith threw Mrs. Perkins down the stairs. While such action is likely to cause bodily injury, death is not the probable consequence of such action.

These facts should be weighed with Harding's

1/ Appellants' motions for acquittal appear in the transcript at 167, 218.

testimony that Smith had in his possession at the time a hawk bill knife", described as a knife with a curved blade. (Tr. 100-N) If there were any real intent to kill Mrs. Perkins, the appellants had immediately at hand a weapon which could more easily have accomplished that end.

There is, of course, Harding's testimony that Rozier said: "I'll kill you, you bastard." (Tr. 100-M, N) This testimony was in response to a question by the Court. It is somewhat perplexing inasmuch as Harding did not say this earlier when he was being questioned by the Judge out of the presence of the jury. Indeed, at that time when the Court inquired: "Did anybody say anything about killing her?" the witness replied: "No, didn't say anything about killing her. She was hollering they were killing her." (Tr. 78) In short, in his first testimony, it was the victim Perkins, not Rozier, who said they were killing her.

In any event Harding himself testified to a specific expression of intent accompanying the use of this weapon which is entirely different from an intent to kill. Harding said that Smith said: "We'll perform an abortion." (Tr. 74) This is poles apart from an intent to kill.

B. Legal insufficiency of Rozier's threatening words.

Quite aside from the obvious inconsistency

in Harding's testimony on this point, and even if we assume Harding's testimony of Rozier's statement is correct, nevertheless that statement is wholly insufficient as a matter of law to evidence an intent to kill. In the heat of argument, threats like "I'll kill you" are common. Accordingly, such threats alone are insufficient to evidence an intent to kill. In Blount v. State, 376 S.W. 2d 844 (Texas 1964), the court found insufficient evidence of intent to kill even though the assailant repeated "I am going to kill you" three times. The court said:

> The general rule as to assault with intent to murder...will be found in Fregia v. State, supra, Ammann v. State, 145 Tex. Cr.R. 34, 165 S.W.2d 744, and 29 Tex. Jur. 2d, Sec. 109, p. 127: "So the fact that the accused threatened to kill the person assaulted or stated at the time that he intended to kill him does not warrant a conviction, if there is no showing that the weapon used was a deadly one, and there is no such description of the wounds as would justify the inference that such a weapon was used." (at p. 849)

See also King v. State, 181 So. 2d 158 (Miss. 1965) ("I'm going to kill someone"), Ammann v. State, 165 S.W. 2d 744 (Texas 1942) ("I came here to stab him and I stabbed him"). And in Fregia v. State, 185 S.W. 11 (Texas 1916), the Court adopted the language of Branch, Criminal Law, Sec. 517:

> If a weapon is not shown to be deadly or wounds serious, it is no assault to murder, though the

> defendant said he intended to kill. . . (at p. 12, underlining supplied)

C. The weapon used and the wound inflicted here are legally insufficient to imply an intent to kill.

We turn now to the question of whether an intent to kill can be implied from the surrounding facts and circumstances. The facts which are deemed most important by the courts, if an intent to kill is to be implied, are the nature of the weapon and the seriousness of the wound. In Blount v. State, supra, the Court said:

> Since many of these cases deal with weapons not deadly, the intent to kill on the part of the accused must be ascertained from the surrounding facts and circumstances. In all of these numerous cases affirmed by this Court the surrounding facts and circumstances show either serious wounds or wounds calculated to produce serious bodily injury or death, or an instrument calculated to cause death or serious bodily injury. (at p. 848)

The Court then examined the facts before it which, in addition to a specific threat to kill, included an attack with a pocket knife requiring ten stitches, corrective surgery in the vicinity of the heart and 13 days in the hospital. It found that no intent to kill could be implied from these facts. The Court said:

> [as to the weapon]
>
> A pocket knife is not per se a deadly weapon, and in order to constitute it such there must be evidence to show that it was so used. (at p. 848)

[as to the wounds]

> However, assuming the position most favorable to the state, that this corrective surgery was necessary on account of the wounds inflicted upon the injured party by appellant, we find nothing in the record to show or even slightly suggest the injuries, cut or cuts were of such a serious nature as to likely produce death or serious bodily injury. (at p. 848; emphasis in the original)

Essentially the same principle on this issue was stated in State v. Farmer, 102 N.E. 2d 11 (Ohio 1951), in these words:

> If the use of a weapon, likely to produce death or serious bodily harm, results in death, such use, in the absence of circumstances of explanation or mitigation, may justify a determination beyond a reasonable doubt that there was an intent to kill. On the other hand, if the instrument so employed is one not likely to produce death or serious bodily harm, such determination will not be justified without some other evidence. See 26 American Jurisprudence 361, Section 305. In other words, though one may be presumed to intend results which are the natural, reasonable, and probable consequences of his voluntary acts, such one may not be presumed to intend results which are not the natural, reasonable or probable consequences of such acts. (at p. 16, underlining supplied)

This language has more recently been quoted with approval in State v. Creech, 214 N.E. 2d 675, 676 (Ohio 1964).

D. Non-use of other available means to kill negatives an intent to kill.

If a means to kill is at hand, which is more likely to produce death and is not used, this negatives the idea of an intent to kill. In Foster v. State, 46 S.W. 231 (Texas 1898), the defendant said he was going to kill the victim and he was going to do so by a slow process; he proceeded to cut off a portion of the victim's sexual organs with a knife. Despite the heinous nature of such an assault, the Court held that this was not sufficient evidence of an intent to kill:

> Now, if we take this proof standing alone, it will appear to negative the idea that he intended to kill him. If he had desired to do that, he could as well have stabbed him as not; for there is no question that he had the means, coupled with the ability, to do so. (at p. 232)

To the same effect is Sloan v. State, 76 S.W. 922 (Texas 1903):

> It occurs to us, in dealing with this testimony, if appellant at any time entertained the intent to take the life of prosecutrix he could have easily done so. The declaration made after the event, when he was in jail, that he intended to kill her, does not find support in the testimony. He may have been guilty of aggravated or simple assault. However, neither of these issues were submitted to the jury. He was not guilty of assault with intent to murder. (at p. 923)

E. Application of these rules to the case at bar.

The weapon in the present case was a curling iron, not a weapon very likely to cause death. It was not used in a manner very likely to produce death. The medical testimony with respect to the wound indicated that there was no damage whatsoever to the vagina. (Tr. 151-152, 154) The injuries which occurred (a 1-1/2" laceration in the anal area, laceration of the skull, disclocation of the joint between collar bone and arm) were not such as would be likely to produce death. (Tr. 150) It was actually the pain in her shoulder about which the victim compained to the doctor: this was altogether unrelated to the weapon. (Tr. 150) If death had been the real intent of these appellants, they had available to them a weapon which would have easily accomplished that result - but they did not use it. Under the circumstances there is, as a matter of law, no basis for implying an intent to kill even if all of Harding's testimony is believed.

III. Harding's Testimony Is So Riddled with Perjury, Conflicts and Inconsistencies As To Be Beyond Belief. This Testimony Should Have Been Excluded from the Jury's Consideration and the Appellants' Motions for Acquittal On Both Counts

Should Have Been Granted for Lack of Any Other Evidence.

(With respect to Point III, appellants desire the Court to read the following pages of the Reporter's Transcript: 19-22, 28-29, 36-40, 47-60, 69-82, 86-92, 100 E-I.[1/])

While the credibility of witnesses is a matter usually for jury determination, there are circumstances where a witness's testimony is so outrageously filled with perjury, conflicts and inconsistencies as to warrant no consideration by the court or jury. Such is Harding's testimony in the case at bar. To summarize:

A. Harding's perjured testimony with respect to the identification of Rozier and Smith.

Harding, under oath, identified Rozier as Smith and Smith as Rozier. (Tr. 47-50) This was clear perjury. In subsequent testimony, both outside of and in the presence of the jury, Harding retracted this and correctly identified Rozier and Smith. (Tr. 56, 60, 70, 100-E, 100-AA-CC)

An explanation for this perjured testimony was offered - to the effect that the witness was 'a little wary" (Tr. 55) because he had been beaten and threatened with respect to his pending testimony. (Tr. 55-60, 100-AA-CC) The beating itself, as we shall see, was also the subject of perjury by Harding.

1/ Also 100-M, V-X, 100 AA-GG, 101, 106-7, 109-13, 119, 121, 125-26, 135-37, 169, 187, 191.

B. Harding's perjury regarding the attack by Rozier upon him.

As noted, Harding attributed his misidentification of Rozier and Smith to fear resulting from an attack upon him by Rozier. His testimony about this attack was that Rozier attacked him outside a restaurant in Southeast Washington and threatened him if he testified. (Tr. 55-57, 86-89) Harding said that Rozier then "went on down the street, and Mellie, the lady who owns the restaurant,...called... the police". (Tr. 88) He testified that he reported the incident to the police. (Tr. 88-89) He testified that he was "taken to D. C. General" Hospital (Tr. 89, 110) and was X-rayed there for injury to his ribs. (Tr. 88, 90) This led the trial court to sequester the jury. (Tr. 92)

The story of this attack was clear perjury. Subsequently, Harding recanted all of this testimony and substituted a story of an attack by several unidentified individuals. (Tr. 100-AA-DD, 109-10) He denied that Rozier was in this group. (Tr. 100-V, 100-BB) He recanted his story that Mellie called the police and said that he called them. (Tr. 100-DD-EE) His testimony that he was "taken" to D. C. General Hospital and X-rayed there was also false. The D. C. General Hospital had no record of his presence there or of such X-rays. (Tr. 100-V) The prosecutor found that Mellie and Lou did not take Harding to the hospital. (Tr. 100-W) Instead he went to the "alcoholic center" of

the hospital under his own power "to come out of [his] drunken condition". (Tr. 100-DD, 110)

C. Other conflicts in the Harding testimony - further confusion as to the identification of Rozier and Smith.

In addition to the intentional misidentification previously related, it appears that Harding continued to be confused about the identity of Rozier and Smith. He repeatedly referred to Rozier as "George" (which is Smith's name). (Tr. 51, 100-CC) He insisted that it was Rozier who met him in the street, got the liquor and took him up to the apartment (Tr. 67, 100-E) and that he then met Smith in the apartment. (Tr. 100-G, 101, 106-107) But it was the uniform testimony of the complaining witness herself, Perkins (Tr. 28-29, 40), Rozier (Tr. 169) and Smith (Tr. 191) that it was Smith and not Rozier who went out to get the liquor and brought Harding up to the apartment.

D. Other conflicts in the Harding testimony - Harding's view through a nonexistent "front window".

As to when he first observed the police, Harding testified:

> A. When I looked out the front I seen them coming.
>
> Q. Front what?
>
> A. Front window. I walked and looked out and seen them coming. (Tr. 112-113, 119)

It is clear, however, that the apartment, from which Harding testified he saw the police coming, was located at the rear of the building and that it would be impossible to see the police through a "front window" in that apartment. (Tr. 36, 136-137)

E. Other conflicts in the Harding testimony - location of the apartment.

Harding testified, and repeated his testimony in response to counsel's incredulous questions, that the Rozier-Smith apartment was located on the second floor. (Tr. 100-M, 111) Also he emphasized that he was careful to count the steps up to the apartment, sixteen in number, because he was a cripple. (Tr. 81, 100-M, 112) It is beyond doubt, however, that the apartment was actually located on the third floor. (Tr. 36, 125-126, 135)

F. Other conflicts in the Harding testimony - his military service with George Smith.

Harding testified repeatedly that he had been in military service with the appellant George Smith and knew him from that time. (Tr. 100-CC-GG) It appears, however, that Harding only went into the army on June 27, 1949, (Tr. 121), while Smith was mustered out on November 17, 1948, (Tr. 187). Further confusion and conflict on this point is Harding's testimony that the George Smith with whom he was in the service was not in the courtroom! (Tr. 55)

G. Other conflicts in the Harding testimony - where was Smith at the time of the assault?

According to Harding, Smith was on the bed in the kitchen at the time of the assault and he rose from the bed in the kitchen to participate in the assault. (Tr. 100-G, 100-I) But this is contrary to the testimony of Perkins, herself. (Tr. 19, 22)

Legal Insufficiency of Such Evidence

Upon such evidence, we submit "a reasonable mind must necessarily have had a reasonable doubt" as to Harding's version of the assault, and hence of the appellants' guilt of the offenses as charged. In that event, this Court has held that the trial court "must not let the jury act. "...the judge must not allow the jury to speculate guilt without evidence or to stray into pure surmise, bias or prejudice." Cooper v. U. S., 94 App. D.C. 343, 218 F.2d 39, 41.

In Curley v. U. S., 81 App. D.C. 389, 160 F.2d 229 (1947) cert. denied 331 U.S. 837 (1947) relied upon in Cooper, this court expressed it thusly:

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether...a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way,

> if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. (at 81 App. D.C. 392, 160 F.2d 232)

It is clear that when the trial court fails so to act, this Court will - that was the situation in Cooper.

The rule of the Curley and Cooper cases has been repeatedly cited and applied: Cephus v. U. S., 117 App. D.C. 15, 324 F.2d 893 (1963); Frady v. U. S., 121 App. D.C. 78, 348 F.2d 84 (1965) cert. denied 382 U.S. 909; Jackson v. U.S., 122 App. D.C. 324, 353 F.2d 862 (1965); Hiet v. U. S., 124 App. D. C. 313, 365 F.2d 504 (1966).

Even the oft-repeated general principle that the credibility of witnesses is to be determined by the jury (and/or the trial court) must yield to the Curley and Cooper rule where the witness's testimony is simply "too incredible". As this court said in Jackson v. U. S., supra;

> But we are not compelled to accept the testimony of any witness. See, e.g., Kelly v. United States, 90 U.S. App. D.C. 125, 194 F.2d 150 (1952); Herter v. United States, 9 Cir., 27 F.2d 521 (1928), both rejecting police testimony....In some cases police testimony, like other testimony, will simply be too weak and too incredible, under the circumstances, to accept. (at p. 866-867)

Were it not so, the court's powers and duty to keep the jury from responding to "surmise, bias or prejudice" (supra) would be a nullity.

In considering the foregoing, we emphasize the special caution with which the testimony of some witnesses, such as the accomplice, the informant, and the informant-addict, shall be viewed. Bush v. U. S., App. D.C. , 375 F.2d 602 (1967) and cases cited there. Special caution is also to be observed when conviction depends upon the credibility of the testimony of a single witness, as here. Gordon v. U. S., 344 U.S. 414 (1953).

IV. The Trial Court Erred in Refusing to Grant Appellant Smith's Motion for Acquittal Due to Lack of a Speedy Trial.

(With respect to Point IV appellants desire the Court to read the following pages of the Reporter's Transcript: 4-5.)

A period of over 13 months elapsed from the date of the offense to the trial of these appellants. During all of that time appellant Smith was incarcerated, his request for release having been denied. A motion for appellant Smith's acquittal for lack of a speedy trial was duly made and denied and renewed at the start of the trial and again summarily denied. (Tr. 4-5)

One prejudicial effect of this delay, in addition to the fact of incarceration itself, was that a critical witness, Elsie Brown, had disappeared. (Tr. 130-31) While we do not know what Elsie Brown may have said, we do know

that she was the only witness at the scene other than the appellants, the victim of the assault (whose testimony did not support in any wise these convictions but was limited to testimony of a simple assault) and the chronic alcoholic (whose perjured and inconsistent testimony is discussed above).

It should be noted at the outset that a lapse of one year and five days between arrest and trial has been held by this Court to present a claim of denial of the Sixth Amendment right to a speedy trial which "has prima facie merit". Hedgepeth v. U. S., 124 App. D.C. 291, 364 F.2d 684 (1966). As noted in that case determination of whether there was such denial "requires an analysis of the particular circumstances of each case" rather than reference to "a fixed maximum period" of time. Among such circumstances the following have been deemed relevant:

A. The actual duration of the delay is still "the most important" circumstance. Hedgepeth, supra, p. 687. In Hiet, supra, a delay of eight months was "a disturbing feature" but this point was not pursued because conviction was reversed on other grounds. (p. 506)

B. Whether the delay was attributable to, or acquiesced in by, the appellant. In Hedgepeth the fact that the bulk of the delay was a direct result of continuances requested by appellant's counsel, or acquiesced in by appellant's counsel, led the court to hold the delay not a denial

of the Sixth Amendment guarantee.

C. Whether the appellant was in jail for want of bail. In U.S. v. Ewell, 383 U. S. 116, 120 (1966), the Supreme Court put emphasis upon this factor:

> [T]he Sixth Amendment's guarantee of a speedy trial * * * is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. (Emphasis supplied)

On this factor the Court in Hedgepeth said: "The long delay in trial [less actually than in the case at bar] is deplorable, particularly because appellant was in jail for want of bail." (p. 688)

D. Whether the appellant was prejudiced by the delay. In Woody v. U. S., App. D.C. , 370 F.2d 214 (1967), a delay of 4 months from the offense to arrest was deemed sufficiently prejudicial to warrant dismissal because in the intervening period a witness had died.

Applying these factors to the case at bar, the trial court should have granted appellant Smith's motion for dismissal. The length of the delay was greater than that which in Hedgepeth the Court described as "deplorable". Throughout the period the appellant was in jail. No portion of the long delay was attributable to or acquiesced in by the appellant. Finally, the disappearance of Elsie Brown was seriously prejudicial to ascertainment of all the facts.

What we have said so far applies to denial of the appellant's Sixth Amendment right to a speedy trial. This was the specific claim in the Hedgepeth case. Rule 48(b) of the Federal Rules of Criminal Procedure also requires a speedy trial and specifically provides for dismissal by the Court of the indictment "if there is unnecessary delay in bringing a defendant to trial". It has been held that this rule places an even stricter burden on the prosecution. Mathies v. U. S., App. D.C. , 374 F.2d 312 (1967). Since even stricter standards are to govern Rule 48(b) it is submitted that the trial court abused its discretion in refusing to grant appellant Smith's motion for acquittal due to lack of a speedy trial.

Conclusion

For the reasons set forth hereinabove, the appellants' motions for acquittal on both counts should have been granted. It is requested that this Court set aside the judgments of conviction and direct entry of judgments of acquittal in respect to each appellant.

Respectfully submitted,

Edwin Jason Dryer
1201 Shoreham Building
Washington, D. C. 20005

Counsel for Appellants
(Appointed by this Court)

October 8, 1968

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 22,157

GEORGE SMITH, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 22,158

JOHNNY B. ROZIER, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
NICHOLS S. NUNZIO,
JAMES A. TREANOR, III,
Assistant United States Attorneys.

Cr. No. 587-67

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ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1) Could consecutive sentences be imposed for assault with intent to kill and assault with a dangerous weapon?

2) Was the evidence sufficient to support a verdict of guilty of assault with intent to kill?

3) Was appellant Smith denied his right to a speedy trial as guaranteed by the Sixth Amendment?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,157

GEORGE SMITH, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 22,158

JOHNNY B. ROZIER, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

a) Summary of Proceedings

Appellants, Johnny B. Rozier, Jr. and George Smith, were arrested on Sunday, February 12, 1967, on a charge of abortion and assault with intent to kill, violations of 22

D.C. Code § 201 and 22 D.C. Code § 501, respectively. The victim of the alleged offenses was one Julia Perkins. On May 15, 1967, a two count indictment was filed charging appellants with assault with intent to kill (22 D.C. Code 501) and assault with a dangerous weapon on Mrs. Perkins (22 D.C. Code § 502). Joint trial commenced on March 13, 1968 and on March 15, the jury returned verdicts of guilty on both counts. Until trial Rozier was at large on bond, while Smith remained incarcerated for want of bail. On June 14, 1968 appellants were given consecutive sentences for the assault with intent to kill and assault with a dangerous weapon judgments of conviction. This appeal followed.

b) The Trial

While the complaining witness Julia Perkins testified at the trial, the narrative of one James Harding provided the jury with the full picture of the critical events that transpired on February 12, 1967 as Mrs. Perkins was unconscious much of the time. Harding, by his own admission an adjudicated chronic alcoholic (Tr. 105), testified that around 2:00 P.M. on the Sunday afternoon in question he was taken to an apartment at 57 Eye Street, N.W., by Rozier, whom in court he initially erroneously called George Smith (Tr. 46, 49, 111), to drink (Tr. 46, 48, 50, 100-E). They had previously purchased a bottle of apple wine, with Harding's money, from a bootlegger (Tr. 100-F). Harding had never met Rozier before (Tr. 106). Once in the apartment Harding met Julia Perkins, appellant Smith, and another lady (Tr. 100-G). The two drinks of wine that Harding had at the apartment were to be his first drinks in two months (Tr. 117, 118).

It was a two room apartment, made up of kitchen and living room. When Harding came in Smith was sitting on a little bed in the kitchen and the complainant was seated on the end of the bed in the living room. After he arrived Mrs. Perkins went to the kitchen to cook. (Tr. 100-H). Rozier then went into the kitchen and the two began to quarrel after she told Rozier that she was preg-

nant and asked him what he was going to do about it (Tr. 100-H, 100-I). Rozier responded, "I don't think its mine. I'm not supporting nothing." (Tr. 100-I). He then struck her with his fists and knocked her down (Tr. 100-J).

As she lay on the floor, Rozier—with Smith's help, ripped her clothes off (Tr. 100-J). While Smith held the screaming woman by the shoulders (Tr. 100-L), Rozier took a tool, a curling iron, and thrust it into Mrs. Perkins' vaginal area. Smith then, while still holding Julia Perkins down, took a hammer from the stove and struck the end of the curling iron with it (Tr. 100-K). When he struck the blow, and then another, the pointed end of the curling iron was in her vagina (Tr. 100-L). Harding said that Mrs. Perkins was bleeding "pretty bad" as a result of the blows (Tr. 100-L). Harding made no effort to help her because at the time he was wearing a leg and arm brace, even though the other lady there was yelling for him to do something (Tr. 100-L, 100-M).

Rozier and Smith then picked up the injured woman, Rozier by the legs and Smith by the armpits (Tr. 100-KK, 102), and threw her down a flight of stairs to the landing below (Tr. 100-M). While this was going on, Rozier said to the screaming Mrs. Perkins, "I'll kill you, you bastard!" (Tr. 100-M, 100-N). Harding then attempted to get out, but Smith who had produced a hawk bill knife, would not let him go. Smith told him, "If you tell anybody what you seen here, you'll get it." (Tr. 100-N). When the police came Harding pointed out to them the curling iron and hammer lying on the kitchen floor (Tr. 100-P). At the time of their arrival the kitchen was, by Harding's description, a mess; the cabinets were turned over and blood, as well as broken glass (Tr. 100-HH), was on the floor (Tr. 100-P). A trail of blood led from the kitchen to the bottom of the stairs (Tr. 100-P).

Further direct examination revealed that Harding's previous identification of Rozier as Smith and his failure to identify any other person in the court room (see Tr. 46-51), was a result of the fact that he had been beaten, the week before, by someone he did not know over "Rozier's and Smith's case * * *" (Tr. 100-AA to 100-BB).

Harding further stated that he was drinking heavily at the time of this beating; that he knew Smith from the Army (Tr. 100-BB to 100-CC); and that after his beating he went to the District of Columbia General Hospital alcoholic center (Tr. 100-DD, 110).

Julia Perkins' testimony was that on February 12, 1967 she was living with Rozier (Tr. 16) in a third floor apartment in the back of a building on Eye Street, Northwest, which they shared with Smith (Tr. 17). On the afternoon in question she was in that apartment as were Smith, Rozier, Harding, and the lady next door (Tr. 18, 28, 31). Although she had not seen it, she said that Smith had gone out and brought in the others (Tr. 28). She said that she and Rozier quarreled in the kitchen after she told him that she was pregnant by him. At this time Smith was in the other room. (Tr. 19) Rozier suddenly grabbed her around the neck and choked her until she lost consciousness (Tr. 20-21). When she came to she was in the Washington Hospital Center (Tr. 22). She further stated that she had on a blouse, skirt and shoes when she went into the kitchen (Tr. 23).

Pvt. O'Toole of the First Precinct stated that when he arrived at 57 Eye Street, N.W., in response to a radio run, he found an almost completely nude woman, wearing only the remnants of a skirt around her waist (Tr. 130), on the second floor landing; this was Julia Perkins (Tr. 123). When he first observed her she was bleeding very badly from the vagina and could not be communicated with (Tr. 124). Rozier was standing about three or four steps up from the body (Tr. 124). O'Toole followed a trail of blood up the stairs and into an apartment at their head, where he met Smith (Tr. 125, 126). The bloody path led into the kitchen area, which was a complete shambles when he entered it (Tr. 126, 127).

He had met Mr. Harding, whom he described as not intoxicated, when he went into the apartment and, after speaking with him, recovered a hammer and a curling iron from the kitchen floor (Tr. 128). He also met there a Mrs. Elsie Brown, who lived in the front of the building

(Tr. 130, 136). He additionally stated that he had not seen Mrs. Brown since that day (Tr. 130). On cross-examination O'Toole testified that while the kitchen was in disarray there was not, to his knowledge, any broken glass on its floor (Tr. 132). About ten minutes after he arrived the ambulance came for Mrs. Perkins (Tr. 134).

Pvt. Short, O'Toole's partner, related substantially the same story as O'Toole (Tr. 155-162), except that on cross-examination he replied "No" when asked if Rozier had told him that Mrs. Perkins had fallen down the stairs (Tr. 163) and responded instead that Rozier had said that Julia Perkins had fallen on a piece of broken glass and that they were carrying her down the stairs (Tr. 164).

Two other witnesses appeared for the Government; Doctor Odriosola, who attended Mrs. Perkins in the emergency room at the Washington Hospital Center (Tr. 148), and Father McKenna who, alerted by the ambulance, went to the scene and gave solace to the complainant (Tr. 100-A). The priest said that when he got to the apartment building Mrs. Perkins, who was naked, was sitting in a pool of blood at the foot of some stairs (Tr. 100-B to 100-C). The doctor said that Mrs. Perkins was suffering from an inch and a half laceration close to the anus, between the rectum and the vagina (Tr. 150, 155), and that while there was a hematoma in the external wall of the vagina there was no injury inside (Tr. 150-151). The doctor also stated, on cross-examination, that this was the major source of the blood loss suffered by the complainant (Tr. 152), that she was not pregnant (Tr. 153), and that the laceration was not of the kind ordinarily made by broken glass (Tr. 154).

Rozier testified that on that Sunday morning he and Smith drank in the apartment until they ran out; and that Smith went out to get more and returned with Harding. (Tr. 171). He said that he was in the kitchen, lying on the bed, when he got into an argument with Julia Perkins who was cooking. He pusher her and she fell against a kitchen cabinet whose contents then fell on the floor (Tr. 171). He pushed her a second time and she fell down and sat on some broken glass (Tr. 172). She then got up and

walked out of the apartment. Rozier heard a noise and went to the door to see the complainant at the bottom landing on the second floor (Tr. 172, 173).

Rozier further testified that when all this transpired the only persons in the apartment were Smith and Harding, and that a woman, Elsie Brown, previously present had left to go to the bath room on the second floor (Tr. 172). He also admitted that the curling iron and the hammer were in the apartment, the latter used to open the refrigerator door (Tr. 175). He did not, however, remember seeing them on the kitchen floor (Tr. 184).

On cross-examination Rozier stated that Mrs. Perkins had been dressed while she was cooking (Tr. 178) but, when asked if she had clothes on when she left the kitchen, he replied "I don't know whether they were torn or not from the cabinet." (Tr. 179). As to the state of her dress as she lay on the landing, he said that her blouse was torn but that he couldn't recall if she had a skirt on (Tr. 180). He also related that during his quarrel with Mrs. Perkins, Smith and Harding, whom he said was sober, were in the living room (Tr. 182), and that the former never put a hand on Julia Perkins (Tr. 186).

Smith confirmed that the other woman in the apartment was Elsie Brown (Tr. 189). He further stated that it was he who ran across Harding on Eye Street and invited him home for a drink (Tr. 190, 191). Smith went to sleep when he and Harding got to the rooms, and when he got up to go into the kitchen he noticed can goods and "stuff" strewn all over the floor (Tr. 191, 192). He didn't remember seeing a curling iron and hammer on the floor (Tr. 205). He then walked out of the apartment and saw Julia Perkins sitting against the wall (Tr. 192). When examined by the prosecutor he related that Elsie Brown was present and Julia Perkins dressed when he fell asleep (Tr. 220), as was Harding who was not drunk (Tr. 203).

He was attending to Mrs. Perkins, to whose state of dress he paid no attention (Tr. 206), when the police arrived (Tr. 207, 208). He went with them up to the rooms which were empty (Tr. 211), as they had been when he

awoke (Tr. 203). The first time he saw Harding or Elsie Brown after he got up was when he was taken away by the officers; they were sitting on the sidewalk outside the building talking to the police (Tr. 212, 213).

c) Sentencing

At sentencing the Judge made it clear that he considered the attempted abortion by hammering the curling iron into the vagina of the complainant and the throwing of the complainant down the stairs separate and distinct assaults not motivated by a single intent. (Sentencing Tr. 5-6). ". . . They were not satisfied with the brutal crime they committed with the dangerous weapon in the manner they committed—and this is all reflected in the record—then the two of them picked this woman up bodily, apparently unconscious, and proceeded to the head of the steps on the third floor and threw her down the steps. . . .

There isn't any question in my mind that the jury probably thought, and I thought, frankly from the evidence, they intended to kill her after accomplishing what they wanted to accomplish. They were so brutal, mean and vicious, they had to throw her down the steps to finish the job." (Sentencing Tr. 6).

ARGUMENT

I. Consecutive sentences for assault with intent to kill and assault with a dangerous weapon were proper where the facts indicated that appellants were not motivated by a single intent and objective in their assaults on the complainant.

(Tr. 71, 100-M)

As appellant correctly points out, consecutive sentences for assault with intent to kill and assault with a dangerous weapon have been proscribed where one act constitutes both offenses. This was the case in *Ingram* v. *United States*[1] where consecutive sentences were imposed for a

[1] 122 U.S. App. D.C. 334, 353 F.2d 872 (1965).

single assault with a knife. However, such is not the case here, as was made abundantly clear by the sentencing judge.[2] The assault with intent to kill, the hurling of the bleeding and unconscious woman down a flight of stairs, was an afterthought to the commission of the prior assault with a dangerous weapon, the supposed abortion attempted by hammering a curling iron into Mrs. Perkins' vagina. As the witness Harding narrated Smith's statement "We'll perform an abortion" (Tr. 71) presaged the assault with the curling iron, while Rozier's declaration "I'll kill you, you bastard!" (Tr. 100-M) came after the vaginal assault and while the two men were carrying Mrs. Perkins out to the top of the stairs. These two acts were plainly not motivated by a single intent and objective. See *Irby* v. *United States*, *supra* note 2.

II. The trial judge properly denied appellants' motion for judgment of acquittal of assault with intent to kill.

(Tr. 19, 20, 28, 46-51, 55-57, 89, 100-AA - 100-DD, 100-E, 100-H, 100-J, 100-K, 100-L, 100-M, 100-V, 102, 110, 111, 113, 120, 130, 137, 150, 152, 154, 156, 171, 172, 179, 188, 190, 214)

Appellants argue that the evidence was insufficient to support a finding of an assault with intent to kill and hence the jury should not have been permitted to consider that count. The standard to be applied in consideration of this assertion is clear: ". . . in deciding whether to submit a case to the jury the trial judge must consider whether reasonable jurymen must necessarily have a reasonable doubt or whether, on the other hand, the evidence was such that a reasonable mind might fairly have a reasonable doubt or might not have such a doubt."[3] The trial judge, ". . . giving full play to the right of the jury to determine

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[2] No doubt mindful of the majority opinion in *Irby* v. *United States*, —— U.S. App. D.C. ——, 390 F.2d 432 (1967, *en banc*).

[3] *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 158, 375 F.2d 332, 334 (1967).

credibility . . .",[4] may properly consider all the evidence introduced in the government's case in chief, in the light most favorable to the prosecution,[5] and on that basis decide whether ". . . . a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime."[6]

The elements of assault with intent to kill are an assault and a concurring intent to kill, and any unlawful assault made with the requisite intent to kill constitutes the offense.[7] In the evidence presented there was an abundant basis for a reasonable juror to conclude that an assault on Julia Perkins, separate and distinct in commission and design from the abortion attack, was perpetrated when her unconscious body was thrown down a flight of stairs; and that this assault was an afterthought to the former attack, and committed with the intent that it produce the death of Mrs. Perkins. The bare bones of Harding's testimony was that after Julia Perkins announced her pregnancy to Rozier (Tr. 100-H), he knocked her down (Tr. 100-J), stripped her (Tr. 100-J) and, with the assistance of Smith (Tr. 100-L), attempted an abortion by inserting a curling iron in her vaginal area and striking it with a hammer (Tr. 100-K); and that the two of them then picked the unconscious woman up bodily (Tr. 102), Rozier expressing an intention to kill her (Tr. 100-M), and threw her down a flight of stairs (Tr. 100-M).

The substance of this narrative was amply corroborated by the testimony of the other witnesses. Mrs. Perkins said that Rozier attacked her when she said she was pregnant (Tr. 19, 20); a priest and two police officers saw her lying naked on the second floor landing in a pool of blood (Tr. 100-B, 130, 156); a curling iron and hammer were recov-

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[4] *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232 (1947).

[5] *Curley* v. *United States*, *supra* note 2.

[6] *Austin* v. *United States*, 127 U.S. App. D.C. 180, 189, 382 F.2d 129, 138 (1967).

[7] *Davis* v. *United States*, 16 App. D.C. 442 (1900).

ered from the littered floor of the kitchen (Tr. 128); and a physician testified that Mrs. Perkins had sustained a laceration in her vaginal area (Tr. 150), of a kind not ordinarily associated with a cut from broken glass (Tr. 154), and that this would have caused a great deal of bleeding (Tr. 152).

Despite this corroboration appellants insist that the entire testimony of Harding should be stricken as inherently incredible. This assertion cannot be predicated on a claim that the others' testimony was more corroborative of Rozier's and Smith's than of Harding's. Rozier said that Mrs. Perkins had fallen on some glass (Tr. 172) and that when she left the apartment she was dressed (Tr. 179); Smith said he was asleep (Tr. 214). The assertion is instead grounded upon an array of insignificant alleged inconsistencies gleaned from the transcript.

Harding said that he was in the Army with Smith (Tr. 100-CC), Smith says he wasn't (Tr. 188). Harding confused the two in court (Tr. 46-51), and then explained this was a result of intimidation (Tr. 100-AA to 100-BB). He named Rozier as the intimidator (Tr. 55-57) and then said it was someone else (Tr. 100-AA to 100-DD). After this beating Harding said he went to D.C. General Hospital and was X-rayed (Tr. 100-E), later he admitted he just went to the alcoholic center (Tr. 89, 100-V, 110). Harding said that he came into the apartment with Rozier (Tr. 100-E); Rozier and Smith said he came in with Smith (Tr. 171, 190), as did Julia Perkins, who apparently was asleep when Harding came in (Tr. 28). As completing this mosaic of incredibility appellants point out that Harding said the apartment was on the second floor (Tr. 111), when in fact it was on the third. This is hardly egregious when you consider that a third floor is two flights up from the front door of a building. Appellants' finally point to Harding's statement that he saw the police coming through the front window. Much is made of this because appellants' apartment was in the rear. It is clear from the testimony, however, that Harding said he saw the police through the front window of the building at the end of the

hallway (Tr. 113, 120); from which window Pvt. O'Toole said the front street could be viewed (Tr. 137). These inconsistencies hardly require that the trial judge withdraw from the jury their function in determining credibility. See *Curley* v. *United States*, *ibid* note 4.

Appellant also argues that since no dangerous weapon was used to attempt to kill Mrs. Perkins, especially when one was available, Smith's knife, that no intent to kill could be inferred. An intentional killing can of course be perpetrated without the use of a dangerous weapon,[8] so the absence of the utilization of such a weapon, even though intent to kill could be inferred from its use,[9] can hardly be deemed to be dispositive of the issue of intent. Those circumstances along with others such as Rozier's declaration "I'll kill you, you bastard!" (Tr. 100-M), the brutality of the entire episode,[10] and the obvious fact that a person could be killed by being thrown down a flight of stairs, could properly be weighted by the jury in determining whether the requisite intent was present.[11] It cannot be said that the presence, or absence, of those factors pointed to by appellants would fairly require a reasonable juror to have a reasonable doubt as to intent to kill.

III. A delay of thirteen months between appellant Smith's arrest and his trial did not deprive him of his right to a speedy trial, where there was no resulting prejudice.

(Tr. 31, 100-G, 100-L - 100-M, 130, 136, 172, 189, 212-213, 220)

Appellant Smith points to the passage of thirteen months from his arrest until trial, and concludes that he

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[8] *Simms* v. *United States*, 101 U.S. App. D.C. 304, 248 F.2d 626, *cert. denied*, 78 S. Ct. 127 (1957).

[9] *Austin* v. *United States*, *supra* note 6.

[10] See *Galvan* v. *State*, 77 Tex. Crim. 646, 179 S.W. 875 (1915), death by throwing.

[11] See *Baer* v. *United States*, 54 App. D.C. 24, 293 Fed. 843 (1923).

has been denied his right to a speedy trial;[12] relying principally on the fact that he was in jail for the entire period and that a critical witness, Elsie Brown, disappeared during the hiatus. There is no *per se* rule which delineates unreasonable delay in terms of time alone; time is but one factor to be considered in the overall determination of the issues, although a claim based on the passage of over a year has prima facie merit. *Hedgepeth* v. *United States*, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966). While a delay on bringing a defendant to trial[13] may be so long (years rather than months) that prejudice may be presumed, (e.g. *Hanrahan* v. *United States*, 121 U.S. App. D.C. 134, 348 F.2d 363 (1965) and *McNeill* v. *United States*, No. 21,570, D.C. Cir., June 4, 1968) in an ordinary case, such as this, some prejudice apart from the fact of detention must be shown. *Evans and Philson* v. *United States*, —— U.S. App. D.C. ——, 397 F.2d 675 (1968). Appellant Smith says that Elsie Brown's absence is that prejudice.

Elsie Brown was, according to the testimony of Smith (Tr. 189), Rozier (Tr. 172), Mrs. Perkins (Tr. 31), and Harding (Tr. 100-G), the other person drinking in the apartment with the three men. By Rozier's testimony she was absent, having gone to the second floor bathroom, during his quarrel with Julia Perkins (Tr. 172). Smith said

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[12] Appellant also claims a violation of Federal Rule of Criminal Procedure 48(b), because there was unnecessary delay in bringing Smith to trial. This rule places a stricter requirement on the prosecution than the Sixth Amendment, *Mathies* v. *United States*, —— U.S. App. D.C. ——, 374 F.2d 312 (1967). However, a motion to dismiss for this reason was not made in the District Court and, by analogy to speedy trial cases, should be deemed waived unless promptly asserted. See *James* v. *United States*, 104 U.S. App. D.C. 263, 261 F.2d 381, *cert. denied*, 359 U.S. 930 (1959), and furthermore should not be considered when raised for the first time on appeal. See *Harris* v. *United States*, 112 U.S. App. DC. 100, 299 F.2d 931 (1962).

[13] The record gives no hint of the reason for the thirteen month delay in this case, nor do the records of the District Court Assignment Office. Those records indicate that the case was put on the ready calendar on March 7, 1968 when trial was set for a date certain of March 13, 1968.

that while she was there when he went to sleep, when he awoke she was gone, not to be seen again until some time later outside the building (Tr. 220, 212-213). Harding's testimony put her in the apartment during the events he related (Tr. 100-I to 100-M), and O'Toole said he found her in the rooms when he went upstairs (Tr. 130, 136). Since she was not at the trial we don't actually know what her testimony would be.

However, if called, her recital either would have been that she was not there during the critical time in question; or that she was and that Harding's narration was an accurate portrayal of events; or that she was there and Smith did nothing to Julia Perkins. Testimony along the first or second lines would have added nothing to, and in the second case, would have been disasterous to, Smith's case. Obviously her "critical" characterization can't be based on that kind of testimony. But what of the possibility that she might say she was there during the quarrel and that Smith did nothing?

Such testimony would, of course, be in conflict with Rozier's, which placed her out of the rooms, and with Harding's, which had Smith joining in the assault on Mrs. Perkins. Smith, in effect, asserts the possibility that she might so testify and the jury might have believed such a story, as constituting her a critical witness. However, testimony along that general tact would further either be that no assault of the grim proportions related by Harding took place, in conflict with the corroboration of a priest, two policemen, and a doctor; or that Rozier brutalized Mrs. Perkins by himself while Smith slept a few feet away, in conflict with the general experience of mankind.

It is plain that Elsie Brown's absence from the trial was of greater value to the appellant than her presence. Any promise she might hold for helping his case is entirely illusory as any testimony of hers which on its face might exculpate Smith would be so incredible as to further inculpate him. The empty promise that Elsie Brown held for Smith is attested to by the fact that at no time did trial counsel request a recess to locate her and, at least on the

record, by his failure to subpoena her. When these realities are considered along with the fact that appellant does not claim that Elsie Brown was unavailable to testify at the trial because so much time elapsed from event to trial,[14] it is clear that appellant's claim of prejudice because of thirteen months delay from arrest to trial is also illusory. See generally *Williams* v. *United States*, —— U.S. App. D.C. ——, 394 F.2d 957 (1968); *Wilkins* v. *United States*, —— U.S. App. D.C. ——, 395 F.2d 620 (1968); and *Harling* v. *United States*, —— U.S. App. D.C. —— (No. 21,345, June 27, 1968).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
NICHOLS S. NUNZIO,
JAMES A. TREANOR, III,
Assistant United States Attorneys.

[14] For all we know she may have disappeared the day after the alleged crime. Pvt. O'Toole said he had not seen her since the Sunday of the crime.

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APPELLANTS' REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

George Smith, Jr., Appellant, v. United States of America, Appellee.	No. 22157
Johnny B. Rozier, Jr., Appellant, v. United States of America, Appellee.	No. 22158

On Appeal From Judgments of the United States District Court

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APPELLANTS' REPLY BRIEF

Argument

I

THE GOVERNMENT'S SIMPLE STATEMENT IN JUSTIFICATION OF THE CONSECUTIVE SENTENCES HERE IMPOSED FALLS SHORT OF THE ESSENTIAL TESTS THUS FAR DEFINED IN INGRAM v. UNITED STATES and IRBY v. UNITED STATES.[1/]

The Government's justification for the consecutive sentences here imposed is that there were, as a

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1/ 122 U.S. App. D.C. 334, 353 F.2d 872 (1965). _____U.S. App. D.C._____, 390 F.2d 432 (1967, en banc).

matter of fact, two separate and distinct intents in this single criminal episode and that, as a matter of law, such separate and distinct intents permit consecutive sentences. Unfortunately neither the facts of the present case nor the law to be applied thereto are that clear or that simple.

A. Were there in fact two separate and distinct intents? (Tr. 76,78,80, 100-J to 100-N, 102; Sentencing Tr. 5-6)

The Government's position is based entirely upon two assumptions of fact both of which are without foundation in the record. One is that there were two separate and distinct intents, one to commit an abortion and the other intent, later, to kill Mrs. Perkins by throwing her down the stairs. The second assumption is that both judge and jury found such separate and distinct intents. Neither assumption is borne out by the record.

The Record as to a Separate Intent to Kill. It is the Government's position that the intent to kill "came after the vaginal assault and while the two men were carrying Mrs. Perkins out to the top of the stairs" and that this was expressed in Rozier's declaration "I'll kill you, you bastard!" at that time. (Br. p.8). But Harding's testimony about Rozier's declaration clearly

indicates that that threat was uttered at some time prior to the time when the two men carried Mrs. Perkins' unconscious body to the top of the stairs. His testimony was that Rozier uttered this threat when "she was still hollering and screaming" (Tr. 100-N); accordingly this must have been before she became unconscious. While the point at which she lost consciousness is not clear, both the trial judge and the Government believed it to be a fact that she was not conscious when she was picked up and thrown down the stairs.[1/] If Harding's testimony as to the threat is true, the threat was made during the abortion assault and certainly prior to their picking up Mrs. Perkins' unconscious body. (Tr. 76, 78, 80, 100-J to 100-N).

For purposes of this Point I, the Government relies entirely on this threat as evidencing a separate intent to kill. It is demonstrated under Point II below that there is no other evidence of a separate intent to kill.

The Record As To A Jury Finding of Separate and Distinct Intents. One would suppose from the Government's Brief that the jury did, in fact, find the existence of separate and distinct intents:

1/ The Government's brief says "...the two of them picked the unconscious woman up bodily (Tr. 102)". (Br. 9) The Judge said "...Then the two of them picked this woman up bodily, apparently unconscious, and proceeded to the head of the steps..." (Sentencing Tr. 5-6).

> In the evidence presented there was an abundant basis for a reasonable juror to conclude that an assault on Julia Perkins, separate and distinct in commission and design from the abortion attack, was perpetrated when her unconscious body was thrown down a flight of stairs; and that this assault was an afterthought to the former attack, and committed with the intent that it produce the death of Mrs. Perkins. (Br.,p. 9).

But nowhere was the jury actually asked to find whether or not there were separate and distinct intents in reaching its verdicts. One intent is equally consistent with either verdict and with both verdicts. Even if there were "an abundant basis for a reasonable juror to conclude" that there were two separate intents, that is beside the point when the jury did not, so far as the record shows, reach such a conclusion or make such a finding.

The Record As To the Judge's Finding of Separate and Distinct Intents. According to the Government, the existence of separate intents was "made abundantly clear by the sentencing judge". (Br. 8). But the judge did not, in fact, make any such clear or express finding of fact. He did state that it was his view that "they intended to kill her after accomplishing what they wanted to accomplish" but it is also clear that in his view that intent was the natural manifestation and outgrowth of increasing viciousness rather than a "separate and distinct" intent. He said: "...they had to throw

her down the steps to finish the job." (Sentencing Tr. 6). In the judge's view it was the same "job" rather than a separate and distinct" one.

The factual basis for the Government's "separate intent" justification for consecutive sentences simply does not exist.

B. Even Assuming Separate and Distinct Intents, Can Consecutive Sentences By Imposed for Acts Constituting In Reality But a Single Continuing Criminal Act?

Even if we assume the existence of two separate and distinct intents, the Ingram and Irby cases, supra, p. 1, do not contemplate consecutive sentences where the circumstances represent "in reality but a single continuing criminal act", or "essentially a single criminal episode". Irby, supra, 390 F.2d 436, 437.[1/] With respect to the very same statutes as are involved here, Ingram specifically held:

> ...it is unlikely that Congress intended a single act to be punished cumulatively as both a more and less serious form of aggravated assault. (p.875).

The Government here seeks to avoid the Ingram holding by application of certain exceptions tentatively enunciated in the Irby case where the court refused to set aside consecutive sentences imposed for house-

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1/ Page references herein to Ingram and Irby will be to the F.2d volumes.

breaking and robbery. The court drew several distinctions between the circumstances of that case and Ingram but none of these distinctions apply to the case at bar which is on all fours with Ingram. However, the fact that Irby has been cited by the Government in the case at bar shows the need for further refinement of the court's views on this problem which were expressly "left by the court to future consideration". (p. 435).

In refining the Irby decision in the light of the present case the following should be noted.

First, the court in Irby recognized that it is "...the legislative intent which primarily defines the limits of the sentencing power." (p. 435). With respect to legislative intent in the statutes applicable it
there,/recognized "the historic difference in concept between housebreaking as a crime against property, on the one hand, and robbery as a crime against the person, on the other." (p. 433). With respect to the legislative intent in the statutes involved in the case at bar, however, this court has already construed that intent; in Ingram it said, as noted above, that Congress did not intend "a single act to be punished cumulatively as both a more and less serious form of aggravated assault."

Second, while there is an indication in the Irby decision that separate and distinct intents may permit consecutive sentences in certain situations, there is no general rule, as suggested in the Government's brief, that separate intents will permit consecutive sentences. The situations where consecutive sentences would be permitted, assuming separate intents, were expressly limited to those where different interests are involved, i.e., crimes separately against property and the person.[1/] This limitation is expressed in both the majority and concurring opinions. (pp. 433, 437). The present case does not meet this test because both crimes are crimes against the person.

Third, it should be emphasized that without such a limitation the concept that separate intents may warrant consecutive sentences poses manifold problems without any workable guide to their solution. The Irby limitation, that separate intents may permit consecutive

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1/ Even in these limited situations, the necessary separate intents, which might permit consecutive sentences, shall not more readily be implied just because separate interests are involved. "...there is no utter conclusiveness to a technical distinction between crimes against property and person, respectively." Irby. p. 434,n.4.

sentences when different interests are involved, is at least a workable delineation. Where the same interests are involved, however, and where the intent involved is an unfolding mixture of criminal purpose rather than clearly and separately identifiable purposes - as in the usual case of any angry attack upon a person - how does one define whether separate intents exist, when they arose, or by what means they are separately manifest?

Fourth, insofar as the court discussed the views of its amicus curiae, and if by implication the court tentatively adopted those views, those views do not permit consecutive sentences merely upon proof of separate and distinct intents. Instead, amicus recommended that consecutive sentences by imposed for offenses arising out of a single course of conduct only if "the sentencing judge (1) finds from the facts that the defendant was not motivated by a single intent and objective, and (2) recites his reasons for believing that consecutive sentences are necessary to achieve at least one of the recognized sentencing goals." (p. 435). Applying the views of amicus to the case at bar, the sentencing judge did not relate his imposition of consecutive sentences to any one of the recognized sentencing goals. Nor does any such relationship appear. In this connection, this Court has indicated in Irby that the maximums autho-

rized for serious crimes are already "enough to accomplish essential purposes of punishment, whether deterrence, reformation, or preventive banishment from society." (p. 439). The consecutive sentences here imposed substantially exceed these maximums.

Fifth, somewhat similar considerations appear in the "fork of the road" (p. 437) and "opportunity for discrimination" (p. 433) concepts in Irby. Would the additional deterrent of consecutive sentences deter an offender in making a choice? In the circumstances of the case at bar, where no decisive point of choice is indicated,[1/] and where large punishments are already provided for either offense, such additional punishment appears irrelevant.

Sixth, it is pertinent to note the efforts of the courts and legislatures over many years to reconcile this problem with the usual net result that consecutive sentences shall not be imposed for "what is essentially a single criminal episode", to use the language in Irby (p. 436) or conduct "which is itself in

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1/ Indeed, the anomaly of the present case is that an assault with intent to kill is sought in circumstances where the ferocity of the alleged attack had moderated rather than increased.

reality but a single continuing criminal act", to use the language in Munson v. McClaughry 198 F. 72 (8th Cir.1912) cited and approved in Irby (at p. 436). While imprecise, these show the direction. The Government's view in the case at bar would reverse that direction.

Perhaps the court may find it desirable in the present case to expand the rules tentatively outlined in Ingram and Irby to minimize further litigation on this issue.

C. Who Shall Determine Whether There are Separate Intents?

A further problem concerns whether the judge or jury should determine the existence or nonexistence of the separate intents permitting consecutive punishments. Judge Leventhal's concurring opinion in Irby suggests that this is a function for the judge as part of his sentencing power - but he does so in the context of the judge reaching a conclusion in support of concurrent rather than consecutive sentences. (pp. 438-39). Is the contrary also true? Is this portion of the Irby decision to suggest that a judge, absent a jury finding of separate and distinct intents, may on his own finding of fact as to intent impose consecutive sentences rather than concurrent sentences? This would seriously undercut the

traditional jury's function of fact determination. In the case at bar, only the judge made this finding, if indeed he did.[1/]

II

THE GOVERNMENT HAS NOT ESTABLISHED AN INTENT TO KILL

The Government argues from a mixed assemblage of all the evidence that there was sufficient evidence of an assault with intent to kill. This argument is inconsistent, however, with its position that there were two separate and distinct crimes with two separate and distinct intents. If there were, as the Government asserts, such separate and distinct intents and crimes, then the evidentiary support for the assault with intent to kill must be found in, and limited to, the time and circumstances to which the intent to kill relates. Nevertheless, even on the total evidence, its demonstration of an intent to kill fails. We consider both alternatives.

A. There Is No Evidence in Support of An Intent to Kill Separate and Distinct From An Intent to Abort.

Adopting arguendo the Government's position

1/ It does not appear that he did. Supra, pp. 4-5.

that there was an intent to kill which came after the vaginal assault (Br., p. 8), we must exclude from analysis of the assault with intent to kill all prior events. The only evidence of an intent to kill is then the testimony that Rozier and Smith threw Mrs. Perkins' unconscious body down the stairs.[1/]

The Government puts the matter incorrectly in saying that an intent to kill may be implied from "the obvious fact that a person could be killed by being thrown down a flight of stairs". (Br., p. 11, Underlining supplied). The law is that the means employed must be likely to produce death if an intent to kill is to be implied. (Appellants' Brief, p. 14). The simple act of throwing Mrs. Perkins body downstairs cannot be deemed sufficient evidence of intent to kill[2/] - especially where means better calculated to accomplish that end were readily at hand. (Appellants' Brief, pp. 15-16).

1/ There was of course Rozier's verbal threat. As noted above, Rozier's threat was actually a part of the vaginal assault and not an expression apart from that assault, so even the verbal threat to kill cannot be considered as evidence of a separate intent to kill.

2/ The Government's reference to Galvan v. State, 77 Tex. Crim. 646, 179 S.W. 875 (1915), expresses no contrary view. Galvan dealt with death to a three-year-old child by throwing her into an adjoining room with such force as to crack her skull. Clearly other circumstances beyond the mere throwing were present and the Government appropriately cites the case with respect to "the brutality of the entire episonde". (Br., p. 11). Our point remains: throwing alone does not manifest an intent to kill especially where better means are available.

B. There Is No Evidence in Support of An Intent to Kill Even In The Entire Episode.

There remains, of course, the question of whether or not an intent to kill can be inferred from the episode viewed in its entirety. We emphasize that an analysis on this basis can arise only if the Government is overruled on its contention with respect ot separate and distinct intents as supporting consecutive sentences. In that event, and only in that event, can the character of the entire episode be considered in determining whether there is evidence of intent to kill.

The Government makes one critical error in logic, or at least misses the point in our initial brief when it says (at p. 11):

> An intentional killing can of course be perpetrated without the use of a dangerous weapon, so the absence of the utilization of such a weapon, even though intent to kill could be inferred from its use, can hardly be deemed to be dispositive of the issue of intent. (Footnotes omitted).

This misses the point of the cases, and of practical experience, that, if clearly better means to kill are available and ignored, one may not imply an intent to kill. (Appellants' Br. 15).

Even accepting Harding's testimony in its entirety, there appears nowhere sufficient evidence of an intent to kill.

C. Harding's Incredible Testimony.

Appellants asserted, as a separate Point III, that Harding's testimony should have been disregarded in its entirety because riddled with inconsistency and selfcontradiction. (Br. 16). The Government has countered (mixed in its Point II) with 1) a list of items on which Harding's testimony was corroborated (Br. 9-10) and 2) the legal concept that Harding's credibility is for the jury, rather than the judge, to determine (Br. 11).

While we said the totality of Harding's testimony should be stricken, we did not of course intend that certain details of his testimony, separately corroborated, were not true. But, considering the many inconsistencies and selfcontradictions in Harding's testimony, it is impossible to separate, in the uncorroborated area, the true from the false. Without Harding's testimony in the uncorroborated area, there is no basis for conviction on either count.

Whether this well nigh impossible task, of sorting truth from falsehood in testimony so blatantly riddled with perjury, should be given to the jury at all,

is a question on which courts have differed in different cases. See Dow, Judicial Determination of Credibility in Jury Tried Actions, 38 Neb. L.Rev. 835 (1939). While Dow notes, under the sub-heading "Self-Contradiction on the Witness Stand", "a great reluctance to deny the jury the right to believe a particular witness" this reluctance is in fact overcome in cases of clear unbelievability. (p. 848). The Government's suggestion that credibility is <u>always</u> for the jury is not sound law. If unbelievable testimony (either in its entirety or in the impossibility of separating the true from the false) is to be denied jury consideration, no clearer case for application of that rule can be imagined than the case at bar.

III

ON DENIAL OF RIGHT TO A SPEEDY TRIAL

(Tr. 100-I to 100-M, 130, 136, 172)

The Government responds to appellant Smith's claim of denial of his right to a speedy trial with two principal points. One is that a motion to dismiss for lack of a speedy trial specifically designating Federal Rule of Criminal Procedure 48(b) was not made in the District Court. (Br., p. 12, n. 12). The other is that Smith suffered no actual prejudice. (Br., pp. 13-14).

A. Rule 48(b) Does Not Have to Be Specifically Designated in A Motion to Dismiss for Lack of a Speedy Trial.

The Government's point here is not supported by any cited ruling that specific reference to Rule 48(b) is necessary in a motion to dismiss for lack of a speedy trial intended to invoke, inter alia, the protection of that rule. Nowhere, either in the Government's Brief or in the cases cited, do we find any indication why such a rule would be sound law.

In the present case the appellant Smith clearly sought dismissal for lack of a speedy trial and his motions were denied. (Tr. 4-5). Those motions were not limited solely to the Sixth Amendment guarantee and cannot be so limited now. The stricter standards of Rule 48(b) should have been applied by the trial court in ruling upon those motions and should by applied by this court now.

B. There Is Actual Prejudice.

In an effort to dispute actual prejudice, represented by the disappearance of a critical witness, the Government speculates as to what her testimony might have been. Such self-serving speculation should be treated as simply that.

Some of the Government's speculation is tied to the fact that Rozier testified that Elsie Brown "had went down to the bathroom" on the second floor (Tr. 172) and therefore the Government says she was not present during the critical time in question. Examining this testimony, it is clear that the time of Elsie Brown's departure for the bathroom is not definite; the time to which the question and answer relate was the time when Mrs. Perkins "was at the bottom of the steps" (Tr. 172). Thus Elsie Brown, even in Rozier's recollection of the incident, was present for part of the episode and she was within earshot of it all. Significantly, it was the testimony of Harding (if he is to be believed at all) that she was present (Tr. 100-I to 100-M) and Officer O'Toole found her there (Tr. 130, 136).

We submit that prejudice, in the form of the disappearance of an actual witness to these critical events, cannot be tossed aside by mere conjecture on the part of the Government as to what she might have said.

CONCLUSION

WHEREFORE, this Court should set aside the judgments of conviction and direct entry of judgments of acquittal in respect to each appellant.

Respectfully submitted,

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December 4, 1968.

APPELLANTS' PETITION FOR REHEARING IN BANC And
Petition For Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America, Appellee, v. George Smith, Jr., Appellant.	No. 22157
United States of America, Appellee, v. Johnny B. Rozier, Jr., Appellant.	No. 22158

On Appeal From Judgments of the United States District Court

This case has appeared before this Court under the title of George Smith, Jr., Appellant, v. United States of America, Appellee, No. 22157, and Johnny B. Rozier, Jr., Appellant, v. United States of America, Appellee, No. 22158.

Circuit

FILED MAY 23 1969

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America, Appellee, v. George Smith, Jr., Appellant.	No. 22157
United States of America, Appellee, v. Johnny B. Rozier, Jr., Appellant.	No. 22158

APPELLANTS' PETITION FOR REHEARING IN BANC

Appellants respectfully petition the Court for a rehearing of this matter. Furthermore, appellants suggest that such rehearing be in banc because questions of exceptional public importance are presented.

I

The Speedy Trial Issue Is a Matter of Exceptional Public Importance

A question of fundamental public importance is presented by the speedy trial issue and the divergent views of

the majority and dissenting opinions as to 1) the appropriate approach of the Court to denial of this constitutional right and 2) the appropriate allocation of responsibility between judicial and legislative branches for the underlying problems in the administration of justice here revealed.

Both majority and minority opinions, of which rehearing is here sought, recognized that the delay in this case was unjustifiable and that the remedy therefor presented a question of public importance. They "differ only in the remedy." (p. 11) The majority opinion adopted the approach that the delay prior to trial of more than one year was a result of unusual strain upon prosecutorial and judicial resources but the legislature had been duly apprised and it was up to the legislative branch of the government to correct the problem. The dissenting opinion on this issue took the approach that the delay constituted a denial of appellant Smith's constitutional right to a speedy trial which the judicial branch could not ignore when it had remedial means, however drastic, at its disposal. In the language of Judge Wright:

> It appears rather to have been the result of the failure of the public and its servants to provide adequate resources for the criminal process. Normally, the allocation of public resources is not the concern of the judiciary. But where, as in this case, such a misallocation leads to the almost blind and mechanical obliteration of a fundamental guarantee against oppression, the drastic remedy is at last called for. (p. 12)

II

The Court's Ruling on the Sufficiency of Evidence of Intent to Kill Should Be Reexamined

On the question of whether or not there was sufficient evidence of intent to kill, the Court's opinion says:

> As to the defendants' intention, the only testimony of intent to kill related to a defendant's exclamation during the first phase of the assault. 1/ (p. 3) (Underlining supplied)

1/ We think there is sufficient evidence of such intent to support the verdict.

For the reasons set forth, and on the basis of the cases cited in appellants' brief (pp. 10-16), it is respectfully submitted that this ruling is in error. In every jurisdiction of which we are aware, something more than an angry exclamation is necessary to support an intent to kill - such as the use of a deadly weapon or the infliction of wounds likely to cause death. As the opinion in this case is now drawn, however, it stands for the proposition, which would be a departure from the prevailing law in virtually all jurisdictions, that an angry threat alone is sufficient evidence of intent to kill.

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May 21, 1969